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No. 96-270

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., *et al.*
Petitioners,

v.

GEORGE WINDSOR, *et al.*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE ASBESTOS VICTIMS OF AMERICA IN SUPPORT OF RESPONDENTS

Maynard Ungerman
Ungerman & Iola
P.O. Box 701917
Tulsa, Oklahoma 74170
(918) 495-0550

Counsel of Record for Asbestos Victims of America
January 15, 1997

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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MOTION OF ASBESTOS VICTIMS OF AMERICA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Pursuant to rule 37.3 of the Rules of this Court, Asbestos Victims of America moves for leave to file the accompanying brief as *amicus curiae*.

AVA was founded in 1981 by asbestos victims and friends to provide an information clearinghouse on asbestos disease and available medical, social, and legal services. A nonprofit educational organization, AVA has grown to an alliance of more than 20,500 victims, union members, scientists, medical and legal professionals, and concerned individuals. AVA is dedicated to increasing awareness of the national asbestos tragedy and its effects upon present and future generations. The interest of AVA in this action is to preserve the rights of future asbestos claimants, who are not provided fair compensation by the class settlement and were not adequately represented during its negotiation.

AVA believes there are several reasons why this brief is significant to the Court's evaluation of the case. The Petitioners, Class Counsel, and the Class Plaintiffs have urged this Court to interpret Rule 23 in a way that, if the district court determines that a proposed settlement is fair and reasonable under Rule 23(e), then the putative class is automatically certifiable. Given that the Settling Parties have placed all of their class certification eggs in the fairness basket, this Court should be made aware of the actual record evidence relevant to the district court's fairness findings.

Consent was granted by many of the parties to the filing of this brief, and no party affirmatively objected. However, because of time constraints, AVA had not yet received written consent from all parties at the time of the filing of this brief. Accordingly, AVA moves for leave to file the accompanying brief as *amicus curiae*.

January 15, 1997

Respectfully submitted,

Maynard Ungerman
Ungerman & Iola
P.O. Box 701917
Tulsa, Oklahoma 74170-1917
(918) 495-0550

Counsel of Record for Asbestos Victims of America

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INTEREST OF *AMICUS CURIAE*

Asbestos Victims of America ("AVA") submits this brief in support of the Respondents, who, in the court below, successfully challenged the injunction issued by the district court restraining asbestos victims from initiating or prosecuting personal injury claims against the Petitioners. The interest of AVA in this action is to preserve the rights of future asbestos claimants, who are not provided fair compensation by the class settlement and were not adequately represented during its negotiation.

AVA was founded in 1981 by asbestos victims and friends to provide an information clearinghouse on asbestos disease and available medical, social, and legal services. A nonprofit educational organization, AVA has grown to an alliance of more than 20,500 victims, union members, scientists, medical and legal professionals, and concerned individuals. AVA is dedicated to increasing awareness of the national asbestos tragedy and its effects upon present and future generations.

INTRODUCTION

AVA submits this brief to show that the proposed class settlement is unfair to class members not only in its overall design, but also in its particular provisions. Respondents and other *amici* address the insurmountable problems endemic to the Petitioners' effort to impose their version of tort reform upon millions of people who have been exposed to Petitioners' asbestos products, but who have not yet manifested any injury, and AVA fully supports the positions taken in their briefs. But even if the Constitution and Rule 23 permit the rights of future asbestos claimants to be extinguished through a "future claimant settlement-only class action," this particular settlement should not have been approved because it does not provide adequate compensation, and because the process by which the settlement was reached does violence to the standards by which the legal profession judges the conduct of counsel.

AVA believes there are several reasons why this brief is significant to the Court's evaluation of the case. The Petitioners,

Class Counsel, and the Class Plaintiffs have urged this Court to interpret Rule 23 in a way that, if the district court determines that a proposed settlement is fair and reasonable under Rule 23(e), then the putative class is automatically certifiable. Given that the Settling Parties have placed all of their class certification eggs in the fairness basket, this Court should be made aware of the actual record evidence relevant to the district court's fairness findings. As will be shown below, Respondents' assertions "about the adequacy of Class Counsel, about the negotiations leading to the settlement in this case and about the settlement itself" are neither "reckless" nor "unsubstantiated," Class Plaintiffs' Br. at 3, but are instead fully supported by the record.

Before examining the actual record evidence, this Court should note that the ballyhooed "findings of fact" of the district court deserve little deference. Almost all of those allegedly factual findings were actually legal conclusions drawn from an uncontested account of factual events and data. For instance, the district court found that the qualifying medical criteria in the settlement for lung cancer claimants are "fair and reasonable," Cert. App. 132a, but there is no dispute that those criteria exclude the claims of many victims of lung cancer who would have viable causes of action under state law. Regardless of how the district court chose to label its findings, to the extent those findings were no more than legal conclusions in disguise, this Court may consider them *de novo*.

Moreover, the district court's "findings of fact" have not yet been subject to any appellate review. The objectors strenuously contest those "findings," but they chose not to raise fact-intensive points regarding fairness and the ethics of class counsel on this appeal from a preliminary injunction. Instead, such points were reserved for any later appeal from any eventual final judgment. As the following discussion shows, in spite of the district court's "findings of fact," the record evidence compels the conclusions that the settlement's terms are unfair and that class counsel's representation was inadequate.

SUMMARY OF ARGUMENT

The settlement fails to provide adequate compensation in several key ways. First, it redefines state law as to what types of injuries will be compensable by setting threshold medical criteria that are, generally speaking, stricter than applicable state law. If those criteria are not met by a particular class member, that victim receives *no* recovery. Additionally, comparison of the compensation values under the class settlement with historical CCR settlement values reveals that those class members who *do* qualify for recovery under the settlement receive significantly less value than they would have received had they filed a lawsuit. Finally, the failure of the settlement to adjust compensation values for inflation ensures that class members who fall ill or die in later years will be grossly undercompensated.

In addition to those problems with compensation values, the system for processing claims under the settlement is unfair to the class. The settlement's claims resolution procedure is run by the Defendants. The settlement provides that the Defendants have sole authority both to make initial determinations on whether a claimant qualifies for compensation under the settlement's strict medical criteria and to determine the amounts of initial "offers" to qualifying class members, within wide ranges. The Defendants have every incentive to "offer" no more than the minimum required to qualifying claimants, and similar incentive to deny compensation altogether to cases close to the borderline of the settlement's exposure or medical criteria. Claimants have virtually no leverage to contest initial determinations of qualifying claim status or settlement value, because the settlement severely restricts the number of class members who may exercise the right to file a lawsuit after going through the settlement's claim procedures. Moreover, that "right" is *only* available to claimants who *meet* the threshold qualifying criteria.

Beyond these grave fairness problems, the record reveals that the process by which the settlement terms were achieved does not conform with long-established standards for competent and ethical legal representation. Apart from their entitlement to adequate

consideration for releasing their rights to sue for asbestos-related injuries, the class members here also deserved loyal representation by unconflicted counsel dedicated solely to the interests of the class. Regardless of whether class counsel put forth good faith efforts to represent this class, the duties they owed to other interests irreparably interfered with that representation. No matter what benefits a settlement provides, it may not be approved over the objections of class members who have been denied their rights to adequate representation by the conduct of the negotiations.

ARGUMENT

I. THE CLASS SETTLEMENT INADEQUATELY COMPENSATES CLASS MEMBERS FOR THE RIGHTS THEY GIVE UP UNDER STATE LAW

According to the complaint, this case is a tort lawsuit. As with any other tort claim brought under the diversity jurisdiction of a federal district court, the filing of this lawsuit did not entitle the trial court to cure any perceived ills in the tort system. Nor did the filing of this lawsuit empower the trial court to clear the dockets of the federal and state courts. The role of the trial court here -- as in any other class action settlement -- was to determine whether class members have been treated fairly and consistently with due process in the settlement of their tort law claims.

Unfortunately, when judging the merits of this settlement, the district court virtually ignored the causes of action available to class members under state law that are released under this settlement and instead rested its fairness determination largely on its conclusion that the various rights and remedies available under state laws reflect poor policy.[1] That determination was both wrong and

[1] *See, e.g.*,Cert. App. at 270a (referring to the "inadequate tort system," and describing how "unimpaired victims have, in many states, been forced to assert their claims prematurely").

beyond the authority vested to an Article III court in a diversity case governed by state law.

A. Large Groups of Class Members With Valuable Claims For Asbestos-Related Disease Will Receive No Compensation Under the Settlement.

1. The qualifying medical criteria exclude many claimants whose claims for asbestos-related malignancies would be compensable under state law

A large percentage of class members who have valuable claims under state law for malignant diseases will receive nothing at all under the class settlement. The settlement's qualifying criteria exclude many asbestos-related lung cancers that would be compensated under state law because those criteria require that the victim of lung cancer must also, in most instances, suffer from underlying asbestosis that would have met the settlement's qualifying criteria for non-malignant disease. SOS at V(B)(2), JA 61.[2]

All seven of the medical experts who testified at the fairness hearing acknowledged that there is significant debate in the medical community as to whether one can attribute the development of lung cancer to asbestos exposure absent a finding of underlying asbestosis. Cert. App. 131a. Because some qualified physicians diagnose asbestos-related lung cancers even in the absence of radiographic evidence of asbestosis, asbestos defendants, including the CCR, have historically settled many claims alleging lung cancer

[2] Citations in this brief to provisions of the class "Stipulation of Settlement" are abbreviated as "SOS", followed by the applicable subsection of the settlement, and the joint appendix citation.

related to asbestos exposure without requiring such x-ray findings.[3] In fact, the unrebutted testimony of Dr. Christine Oliver revealed that 45%-50% of individuals that she would diagnose with lung cancer related to asbestos exposure will not meet the qualifying criteria under the class settlement, because their chest x-rays and pulmonary function tests do not provide the requisite evidence of underlying asbestosis. JA 838. Dr. Oliver further testified that approximately 50% of victims who in her opinion have asbestos-related "other" cancers, i.e., cancers other than mesothelioma or lung cancer, will also not meet the settlement's qualifying criteria.

Obviously, any persons who Dr. Oliver or any other qualified physician would diagnose as having an asbestos-related disease would have a claim that would survive summary judgment in the tort system. While qualified physicians can disagree regarding diagnoses of asbestos-related diseases, the mere possibility of a jury accepting the positive diagnosis gives a plaintiff's case settlement value. This reality is reflected by CCR's historical practice of settling 99.8 percent of cases filed against it in the tort system (which, of course, includes non-qualifying malignancy claims).[4]

2. The class settlement deprives a large percentage of class members who develop non-malignant asbestos-related diseases of the choices available to them under state law.

The settlement abridges the rights of many victims of asbestos-related non-malignant disease by establishing a threshold definition

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[3] Testimony of Michael Rooney, March 1, 1994 at 169-71 (while he was an asbestos claims adjuster at Travelers Insurance and at CCR, there was never a requirement that the plaintiff have underlying "markers" of asbestos exposure in order to settle a claim for an asbestos-related lung cancer).

[4] The March 17, 1993 Response of the CCR Defendants to the trial court's Order to Show Cause state, "[T]he CCR Defendants' experience [is] that more than ninety-nine percent (in fact 99.8%) of the cases against them settle." JA 125.

of compensable injury that differs from the definition of injury under the substantive laws of almost every state. In order for victims of non-malignant asbestos disease to qualify for cash compensation under this settlement, they must show not only that asbestos has caused scarring of the lung or the lining of the lung, but also that they have a certain level of functional breathing difficulties as measured by pulmonary function tests. *See* SOS, Part V(B)(4), JA 63-64. In sharp contrast, under the laws of almost every state, demonstrable scarring of the pleura or interior lung tissue as a result of asbestos exposure is itself a cognizable injury giving rise to a claim for money damages. The Settling Parties have virtually admitted that a majority of the claims in the tort system for non-malignant asbestos-related injuries will not meet the settlement's criteria for cash compensation.[5] Rather than receiving cash, these non-qualifying class members are allegedly provided a "package of benefits" to compensate them for releasing their damages claim. However, a detailed analysis of these alleged benefits demonstrates that they are all either already available to victims of non-malignant disease in the tort system, or they have not been proven by the Settling Parties.

The district court identified six benefits provided by the settlement to non-qualifying claimants with non-malignant disease. Cert. App. 173a-174a (citing, for example, that the settlement will provide faster payment than a lawsuit if a class member should develop a qualifying disease). The initial problem with the district court's analysis is that all six of these alleged "benefits" to non-qualifying claimants actually are arguments that the settlement provides value to *qualifying* claimants that *qualifying* claimants allegedly would not receive in the tort system. This entire analysis rests on the assumption that, once a claimant develops a qualifying disease, she will be able to receive greater value for her claim

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[5] Dr. Victor Roggli, one of the Settling Parties' medical experts, testified that claims for pleural disease that would not meet the *Georgine* qualifying criteria "definitely" make up at least a plurality of all asbestos-related illnesses, and "probably" constitute a majority. JA 807-08.

under the class settlement than she would if she filed a lawsuit in the tort system. As discussed later in this brief, such an assumption is grossly inaccurate.

For present purposes, the bottom line for non-qualifying claimants is that the value of their claims is drastically reduced because they no longer have the option of seeking a cash settlement or judgment for money damages. Contrary to the semantic smoke and mirrors adopted by the district court, non-qualifying claims are *not* "deferred." Instead, such claims are entirely released for no money plus the CCR's agreement to waive the statute of limitations, an option that CCR historically made readily available to all plaintiffs.[6] Only if the claimant later develops a qualifying disease, which would give her a much more valuable and different lawsuit in the tort system, can that claimant ever receive any money under the settlement.

By cutting off the option to seek cash compensation, the settlement significantly and unfairly reduces the value of so-called non-qualifying, non-malignant claims, which *do* qualify for compensation in the tort system. Freedom of choice is valuable in and of itself as a means to further the personal autonomy of a claimant, but this particular choice is critical since many claimants with non-qualifying claims are unlikely to develop a qualifying

[6]Mr. Rooney testified that CCR is generally willing to provide "Green Cards," or agreements to waive the statute of limitations upon a claimant's development of a more serious disease, to any tort claimants who desire them, and that he cannot think of a "downside" to CCR of providing such a Green Card. Depo. of Michael Rooney, January 10, 1994 (Vol. I) at 171-72; and at 169.

injury and would thus never benefit from the class settlement.[7] The relative value of a waiver of the statute of limitations as compared with a cash settlement will differ drastically depending on the life circumstances of a particular individual, and removing the choice of claimants to seek cash unfairly abrogates the rights of the largest single group of people with asbestos-related injuries -- those with non-qualifying claims for non-malignant disease.

Although the Settling Parties' medical experts all opined that the settlement's qualifying criteria for non-malignant injuries are medically reasonable, such testimony was irrelevant to the district court's determination whether the settlement fairly compensates claimants for releasing their tort claims. Since this action was filed, the Settling Parties have attempted to frame the debate over the settlement's fairness as a policy battle regarding the merits of providing a tort law remedy to claimants who cannot demonstrate objectively measurable asbestos-related breathing difficulties through pulmonary function testing. *See, e.g.*, Proffer of the CCR Defendants of June 25, 1993, at 37 ("whether claimants with pleural plaques should receive compensation is a hotly-debated issue in the asbestos litigation"). AVA strongly disagrees with the position of the Settling Parties that, as a policy matter, such victims should not have cognizable tort claims. *See* Testimony of Dr. Christine Oliver, March 14, 1994 at 143 (describing how many

[7] While the record contains contradictory evidence regarding the extent to which non-qualifying, non-malignant claimants will eventually develop qualifying illnesses, there is no question that large numbers of claimants will never do so. Furthermore, the relative risk of developing a future malignancy will differ with each claimant, depending upon exposure history, life expectancy, and genetic propensity to develop cancer. While it may be true that a waiver of the statute of limitations acts in some sense like an "insurance policy" against the non-qualifying claimant developing a more serious asbestos-related illness, for many claimants the "premium" of giving up the right to pursue the cash will not be worth the "coverage," for reasons related to the individual life circumstances of the claimant. Absent the class settlement, whether to take out such "coverage" is, and should remain, a decision for each *individual* class member to make.

patients suffer from shortness of breath related to their asbestos exposure that is not reflected by pulmonary function test results). But whatever outcome that policy battle might have in an appropriate legislative or state judicial forum, that debate should not have been an issue facing the trial court. Under the laws of nearly every state, class members who can demonstrate through x-rays that their asbestos exposure has caused scarring on their lung or pleura have a cognizable injury and a claim for damages. Those claims have cash settlement value in the marketplace, and the class settlement fails to compensate class members fairly for releasing those claims because it removes the claimant's option to seek cash.

3. The settlement releases class members' loss-of-consortium claims for no consideration.

Several of the class representatives and millions of putative class members have alleged claims against CCR based solely on their loss of consortium. These plaintiffs are the spouses, parents, children, and other relatives of class members who have been exposed to asbestos, some of whom have physical symptoms, but most of whom do not. JA 13-14. The purpose of including the loss of consortium class members is unmistakable: the settling parties hope to extinguish all of the consortium claims without making *any* payment to the class members asserting those claims.

The unfair treatment of these class members is breathtaking. Exposed class members who suffer, now or in the future, from a compensable asbestos-related injury eventually will be paid, but their spouses, parents, children, and other relatives take *nothing at all*. This result can be seen clearly from the settlement, which defines "Claim" and "Settlement Class Member" to encompass loss of consortium claims and claimants, JA 49-50, but which only compensates claimants for their own physical injuries. SOS(VIII)(B), JA 79-82 & Exs. A, B, JA 108-110.

At the fairness hearing, CCR claimed that its historical settlement data included loss of consortium settlements and that those settlements were made in conjunction with the settlement of

the exposed person's claim. Testimony of Michael Rooney, March 1, 1994 Tr. at 186-87. This testimony is telling for what it omits. That consortium claims are usually settled together with the primary claims says *absolutely nothing* about how those claims are *valued* in the tort system. The presence of relatives as plaintiffs in a typical asbestos suit *must* add value to the suit. If that were not so, plaintiffs' lawyers would not routinely include loss of consortium claims in asbestos personal-injury complaints, *and* the CCR would not have negotiated their inclusion in the class. In any event, the record is bereft of *any* indication that the CCR's settlements have ordinarily valued loss of consortium claims at zero, which is what the settlement does here by failing to make any payments to the loss of consortium class members.

B. On The Whole, Class Members With Qualifying Claims Would Be Able To Secure Greater Monetary Compensation By Filing Lawsuits.

On average, the class members who receive cash compensation under the class settlement will receive less money than they would if they had filed an individual tort lawsuit. For the most part, in order for a claimant to receive cash compensation for an asbestos-related disease, he or she must meet the medical criteria set out for each compensable medical category in Section V(B) of the settlement. JA 60-65.

Class members who meet the criteria may elect to be paid through one of three procedures: "the simplified payment procedure," Part VIII(B)(1), JA 79, "individualized payment procedure," Part VIII(B)(2), JA 80, or the "extraordinary claims procedure," Part IX, JA 82. However, for purposes of determining what the average class member with a qualifying claim will receive under *Georgine*, analysis of the individualized payment procedure is all that is necessary. Under the individualized payment procedures, qualifying claimants will be paid significantly less than what similarly situated claimants would receive in the tort system.

1. Because qualifying claimants have no leverage to refuse an offer made under the class settlement, such claimants will be paid the minimum of the negotiated average value range for their claims.

The *Georgine* settlement provides that the CCR "shall evaluate all Qualifying Claims for which individualized payment procedures have been elected." JA 80.[8] Based on this evaluation, the CCR "shall make a good faith offer" to each Qualifying Claimant for an amount between the minimum and maximum negotiated values for the particular disease category from which the claimant suffers. While any particular qualifying claimant who is applying for compensation under the individualized payment procedures may recover any amount between the minimum and maximum values, for the class as a whole the only relevant values are contained in the "Negotiated Average Value Range" ("NAVR"). This is because "the average amount offered in settlement to those Claimants with Qualifying Claims who have elected the individualized payment procedures in each Compensable Medical Category in any six-month period, shall fall within the negotiated average value range for that compensable medical category." JA 81. Both the minimum

[8] The settlement also provides that CCR makes the initial determination whether a claim qualifies for compensation at all. This includes determining whether the claimant has met the exposure criteria, SOS IV(A), JA 56-57, the medical criteria, SOS III(B)(2), JA 53, and even whether the claim is time barred by applicable statutes of limitation. SOS VI(A), JA 75. While the settlement allows claimants to "appeal" CCR's initial determinations to third parties chosen jointly by the parties, clients with potentially valid claims often do not appeal because they assume, rightly or wrongly, that the initial decision was correct, or that they do not want to bear the additional time and expense. In a system in which the initial decision-maker is neutral, deciding not to pursue an appeal is often a rational decision based on all the risks and benefits. Here, however, such forbearance will reflect no more than the fundamental unfairness of the CCR-dominated claims procedure. Moreover, claimants who do not meet the settlement's qualifying criteria are not entitled to exit to the tort system, so the propriety of CCR's determinations can only be tested by procedures established within the settlement. SOS(X), JA 87.

and maximum values and the NAVR for each compensable medical category are found in the Compensation Schedule, Exhibit B to the settlement. JA 110.

Qualifying claimants who are dissatisfied with the "offer" CCR makes them have no leverage to force CCR to a higher figure. For claimants who believe their claim is worth more than what the CCR has offered, there are only three options: they can apply for Extraordinary Claim treatment, they can stand in line to exit to the tort system or to binding arbitration, or they can accept the offer. For the vast majority of qualifying claimants, neither of the first two options will provide them any benefit,[9] so claimants will be effectively forced to accept CCR's initial offer whether they like it or not.

Because qualifying class members will have virtually no choice but to accept CCR's initial offer, CCR has no incentive to offer claimants, on average, amounts greater than the low-end of the NAVR. The terms of the settlement do not require CCR to pay any more to claimants on average than the low end of the NAVR. In light of the fact that almost all qualifying claimants will effectively be forced to accept CCR's initial offer, CCR would be acting irrationally if its average offer exceeded the bottom of the NAVR.

2. CCR's historical settlement averages are significantly higher than the amounts CCR is required to pay under the class settlement.

[9] In the compensable medical categories of mesothelioma, lung cancer, and "other cancer," no more than 3% of qualifying claimants may be selected as extraordinary claims. Worse, only 1% of qualifying non-malignant claimants may be selected for extraordinary claim treatment. With respect to the supposed "right" to exit to arbitration or the tort system, only 2% of mesothelioma and lung cancer victims, 1% of other cancer victims, and .5% of non-malignant victims may exercise this right in any given year. What this means in real numbers is that, of the claimants seeking individualized payment in the first year of the settlement, a maximum of 97 -- .6% of the total -- could have rejected CCR's first and only offer and access the tort system. JA 173-74.

Once one assumes that CCR will act rationally and pay claimants no more than the settlement obligates them to pay, it becomes clear that the class settlement, on average, will afford significantly less compensation to class members than historical settlement averages would dictate. In each disease category, CCR's overall historical mean for settlements paid that type of claim substantially exceeds the averages that will be paid under the SOS. The chart below demonstrates that fact:[10]

DISEASE	CLASS ACTION AVERAGE	HISTORICAL SETTLEMENTS	PERCENTAGE DIFFERENCE[11]
Mesothelioma	$44,890	$68,657	53%
Lung Cancer	22,180	30,578	38%
Other Cancer	10,715	16,939	58%
Non-Malignant	6,242	8,810	41%

As the above chart demonstrates, victims who suffer from diseases in each compensable medical category will be paid far less under the class settlement than what CCR has historically paid individual

[10] This chart uses a "blended average" to determine the average overall values CCR will pay to all qualifying claimants. This average includes both non-extraordinary claims, based on the bottom end of the NAVR, and extraordinary claims, assuming that extraordinary claims will be paid at their maximum. *Compare* Settling Parties' Exhibit SP 601B and 601D (making same comparison, but assuming claimants will be paid the *top* end of the NAVR). The district court found the settlement's compensation to be "fair" by comparing the top end of the NAVR to historical values. *See* Cert. App. 139a (relying on SP 601B-D).

[11] This column reflects the percentage by which historical averages exceed the "blended average."

claimants with the same diseases.[12] In the aggregate, by paying at the low end of the NAVRs, CCR will save more than *one-third of a billion dollars* over the first ten years of the settlement. *See* chart attached to district court docket no. 1058.

Finally, the district court's contentions regarding benefits provided by the settlement to qualifying claimants that are allegedly unavailable to those claimants in the tort system are meritless. *See* Cert. App. 173a-174a. The same defenses that are waived under the settlement are also waived whenever CCR settles a claim in the tort system. The value of any such waiver, therefore, is fully reflected in the market's valuation of the case. That is, to the extent CCR has available any viable defenses to claim, the possibility that such defenses will be accepted by a court or jury reduces the value of the claim for settlement purposes. Thus, while a waiver of such defenses is indeed valuable, it is a value that, for purposes of comparing the class settlement with the tort system, is already accounted for by tort settlement averages.[13]

3. By failing to provide any means to account for inflation, the settlement ensures that future claimants will be grossly undercompensated.

[12] This comparison of the negotiated value range to historical settlement data understates the extent to which class members are being undercompensated by the class settlement, because many claims that would not qualify to be paid under *Georgine* are included in that data, and the value of those non-qualifying claims in the tort system is generally less than the value of those claims which would qualify for cash under *Georgine*. Testimony of Michael Rooney, March 1, 1994 at 184-87.

[13] Nor does the record reflect the value of the opportunity under the settlement for claimants who suffer from non-malignant disease to later bring a claim for any subsequently-developed malignancy. Indeed, the fact that 90% of tort claimants have refused CCR's offers of analogous "limited releases" is evidence that such releases are not worth as much as the increased cash a claimant can receive by providing a full release of all claims. *See* Testimony of Michael Rooney, February 28, 1994 at 243-44.

As the previous section demonstrates, compensation values under the class settlement are severely inadequate when compared with CCR's historical settlement averages. But even this comparison understates the difference between the value of qualifying class members' claims under the settlement and the value of their lawsuits in the tort system.

The most dramatic problem associated with relying solely on historical settlement averages as a baseline for negotiating the class settlement is the settlement's failure to account for inflation. The problem caused by inflation is simply stated. As prices rise, goods and services become more difficult to obtain, unless the resources available to purchase those goods and services rise at the same pace. Inflation has been a continuous presence in the American economy since the 1940's, rising as much as 103.4% over the course of one decade (the 1970's). Astoundingly, the class settlement does not take inflation into account. The Stipulation compensates qualifying claimants in accordance with a *fixed* schedule of average dollar payments, *with no provision specifically to adjust for inflation*. Even if we conceded that the compensation values under the settlement are fair in 1993 dollars -- which we do not -- it is surely not fair to pay class members who qualify for payment in 2003, or 2013, in the same 1993 dollars.

Over the past half-century, the cost-of-living has consistently risen significantly during each decade. On April 8, 1994, the district court took judicial notice of the "all items" Consumer Price Index for all urban consumers, known as the "CPI-U," from the date of its inception, January 1913, through January 1994, and the CPI-U for medical care from 1966 through 1993. Docket No. 1005.

The amounts reflected in the settlement's Negotiated Average Value Ranges for each compensable medical category are frozen in place for the first 10 years of the settlement's operation, *i.e.*, through late January 2004, *see* SOS, XXVII.G., JA 105, regardless of increases in the cost of living or any other factor that would render such future awards manifestly unfair. After the first 10 years, these amounts still may not increase. Rather, at the beginning of year 10, class counsel and CCR are directed to

negotiate adjustments, if any, to the compensation schedule. If that negotiation is unsuccessful, the matter is submitted to non-binding mediation and, if necessary, to binding arbitration to be completed by the end of the third quarter of year 10. SOS, VII.B.1. and 2, JA 77. However, "*in no event shall any adjustments to the values in the Compensation Schedule ... exceed the values in the Compensation Schedule for the prior ten (10) year period by more than twenty percent (20%).*" *Id.* VII.B.3., JA77 (emphasis added).[14]

In the 20 years prior to January 1994 when CCR began processing claims under the settlement -- December 1973 through December 1993 – the CPI-U increased by *215.6%*. Moreover, the rate of inflation for medical costs has recently exceeded the overall inflation rate by a factor of two or three. John C. Coffee, Jr. *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1377 n.122 (1995). Yet, under the settlement, for the next 20 years, the Compensation Values will be adjusted upward *no more than 20%*. Thus, if the inflation over the next two decades is anything approaching what it was over the last two, awards under the class settlement will become virtually worthless.

Tort awards and settlements should keep pace with inflation, because large components of such awards and settlements -- *e.g.*, lost wages and medical care -- are themselves driven by inflation. *See* M. Peterson, *Compensation of Injuries -- Civil Jury Verdicts in Cook County* 46 (Rand 1984)(jurors were remarkably adept at adjusting awards for inflation). Thus, a tort award for lost future income made in the year 2000 would look to wage rates in that year and into the future. *See id.*; Blackmar, and Wolff, 3 *Federal Jury Practice and Instructions* § 85.04, p. 316 (4th ed. 1987). The same is true for an award of the cost of present and future medical care, where the real cost, at the time of the trial and beyond, of the

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[14] We note the shocking inequality of this provision in that there is *no downward limit whatsoever* on any adjustment, although the upward limit is 20%. The adjustments are to be made every 10 years in perpetuity, but, for simplicity, we consider only the settlement's operation over the first 20 years.

relevant goods and services would be assessed. *Id.* § 85.07, pp. 319-20.

C. The Evidence Fails To Show That the Class Settlement Will, On Average, Provide Compensation To Qualifying Claimants More Quickly Than the Tort System

One of the Settling Parties' major selling points in this litigation has been that the *Georgine* agreement will allegedly provide compensation to qualifying claimants more quickly than the tort system. *See, e.g.*, SOS at 3, JA 47 ("The procedures set forth in this Stipulation would provide a . . . speedy . . . method of compensating claimants"). But neither the Settling Parties nor the district court have pointed to any evidence to show that class members will be paid any faster on average, or even as fast, under the class settlement than they would have been paid had they filed lawsuits.

Whether qualifying claimants will actually be paid quickly after submitting their claim under the settlement depends entirely on whether the case flow limitations for a particular disease category have been exceeded during the year in which the claim is submitted. *See* SOS, Part VIII(A)(1), JA 77-78. If more than the maximum number of qualifying claims in a particular disease category is submitted in a given year, then the excess claims will be first in line to be paid the following year, and they will be counted against the case flow maximums for that next year. *Id.* Thus, if the case flow maximums underestimate the number of qualifying claims in each year, with each passing year there will be a growing backlog of claims waiting to be paid. *See* Testimony of Michael Rooney, March 3, 1994 at 52-54 (discussing potential backlog of non-malignant claims).

In negotiating the case flow maximums, the Settling Parties failed to perform the only analysis that would have enabled them to determine the effect such caps would have on the timeliness of claims payment -- a projection of the number of future claims likely

to be filed against the CCR companies. Obviously, without having some estimate of how many class members will submit qualifying claims, there is no way to estimate whether or to what extent the case flow maximums will be exceeded. Without knowing whether the caps will be exceeded, there is no way of knowing how long a claimant will have to wait to be paid. CCR Chief Operating Officer Michael Rooney, the only witness to testify at the fairness hearing who actively and extensively participated in the negotiation of the *Georgine* settlement repeatedly said that he didn't expect or know "anything" with respect to future filings against CCR. Testimony of Michael Rooney, March 1, 1994 at 195. Similarly, Martha Wilke Murray, CCR's appointed keeper of relevant statistics, testified, "I have no idea what the number of claims to be filed in the future will be." Testimony of Martha Murray, March 11, 1994 at 294. Mr. Rooney also testified that he did not recall either that class counsel asked CCR to perform a future claims projection, or that class counsel had ever indicated that they would perform their own such projection. Testimony of Michael Rooney, March 3, 1994 at 163-64.

The only basis for the district court's finding that the settlement will provide "prompt compensation," Cert. App. 268a, is its finding that "the Case Flow Maximums, if reached, would result in the CCR defendants paying claims at a faster rate, than they have ever paid before." Cert. App. 145a. That statement, however, which is based on CCR's expressed hope or expectation that it will resolve a certain number of pending claims *outside the class*, in combination with the claims resolved under the class settlement, has nothing to do with whether *class members* will receive timely payments under the settlement. *See* SP Exhibit 601(H) (relied on by district court at Cert. App. 145a). No matter how many claims CCR settles in the tort system, class members

who have not opted out will have to resolve their claims through the class procedure, which is subject to the case flow caps.[15]

The only evidence that indicates the likely number of future claims to be filed shows that the case flow maximums will be exceeded and qualifying claimants who file in the later years of the settlement may well have a longer wait on average than they would in the tort system. Based on work he has done predicting the time course of cancer, Dr. William Nicholson was able to evaluate the effect of the caps based on the assumption that the case flow maximum for the first year of the settlement accurately predicts how many qualifying lung cancers will be filed against CCR in that year. Using that generous assumption, and charting the overall incidence of lung cancer from that point forward, Dr. Nicholson predicted that lung cancer claimants would be forced to wait in line in the later years of the settlement because the decrease in the case flow maximums for lung cancer does not correspond with the expected incidence of asbestos-related lung cancers over the same period. In other words, while the case flow caps go down, the rate of asbestos-related lung cancers being filed will remain almost constant. Deposition of Dr. William Nicholson, March 31, 1994 at 71-73. This problem is also true for the mesothelioma case flow maximums under the settlement. *Id.* at 66. The Settling Parties' own expert confirmed that the incidence of asbestos-related mesothelioma cases over the course of the settlement is expected to remain the same, and he also assumed that the incidence of asbestos-related lung cancers will remain constant. Testimony of Dr. Victor Roggli, March 9, 1994 at 150; 121-23.

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[15] An additional problem with the Settling Parties' claim of efficiency from this class settlement is that virtually all lawsuits against CCR also involve other asbestos defendants. *See* Testimony of Michael Rooney, March 10, 1994 at 3-4. In order to recover against those defendants, class members will have to pursue a lawsuit, apart from their administrative claim against CCR pursuant to this class settlement. Such a duplication of effort will actually *increase* a claimant's transaction costs, and *decrease* efficiency with respect to *overall* resolution of their claims against all defendants.

II. CLASS MEMBERS WERE DENIED DUE PROCESS BY CLASS COUNSEL'S FAILURE TO PROVIDE ADEQUATE REPRESENTATION

The manner in which the Settling Parties negotiated the proposed settlement denied due process to class members because the conflicting interests of class counsel interfered with their representation of the class. In the summer and early fall of 1992, when class counsel undertook the fiduciary responsibility to negotiate on behalf of class members, they faced an immediately apparent ethical conflict of interest created by the combination of their concurrent representation of present and future asbestos claimants and CCR's announced settlement posture. Later, the divided loyalties created by this conflict flowered into a forced trade-off of the rights of one group of clients against another.

Because the conduct of these negotiations raise so many troublesome questions regarding the loyalties of class counsel, the Settling Parties would prefer the Court to presume from the district court's review of the settlement that the negotiations were properly conducted. Pet. Br. at 46 ("a court's determination that the terms of the settlement are fair presumptively establishes that the class received adequate representation"). But that is not correct. As the Seventh Circuit stated in *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106 (7th Cir. 1979):

> No one can tell whether a compromise found to be "fair" might not have been "fairer" had the negotiating [attorney] possessed better information or been animated by undivided loyalty to the cause of the class. The court can reject a settlement that is inadequate; it cannot undertake the partisan task of bargaining for better terms. *The integrity of the negotiating process is, therefore, important.*

594 F.2d at 1125 n. 24 (emphasis added).[16] Regardless of the district court's conclusions regarding the fairness of this settlement's terms, it erred by approving the settlement in light of the overwhelming evidence that class counsel negotiated the deal burdened by significant divided loyalties.

A. Class Members Gave Up Rights During The Negotiation In Return For Consideration That Did Not Go To the Class

In any negotiation, if one party desires a certain term or concession, the other party is given leverage to demand something in return. For example, in negotiating the typical personal injury settlement, the defendant's desire to avoid the uncertainty of a possible jury verdict allows the plaintiff to demand a higher price. As a result, the closer the case comes to trial, the more the defendant is generally willing to pay in settlement.[17] During the course of the negotiation of this class action settlement, CCR demonstrated a willingness to pay significant value in return for the class giving up their right to seek monetary compensation absent a demonstration of measurable functional breathing impairment from asbestos exposure. So, one would think that the affected class members would have gained substantial benefits by conceding that point. Perhaps, for instance, medical monitoring benefits could

[16] *See also In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 224 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987) ("We also reject the district court's finding that its authority to approve settlement offers under Fed. R. Civ. P. 23(e) acts to limit the threat to the class from a potential conflict of interest"); In *re Baldwin-United Corp.*, 105 F.R.D. 475, 482 (S.D.N.Y. 1984) ("[i]n order to supplement judicial examination of the substance of a compromise agreement . . . attention must be paid to the process by which a settlement has been reached").

[17] Mr. Rooney acknowledged that this is generally true in the asbestos litigation. *See* Testimony of Michael Rooney, March 1, 1994 at 221.

have been obtained for non-qualifying class members. But a review of the history of the negotiations reveals otherwise.

Since 1991, CCR had been unwilling to negotiate inventory settlements with plaintiffs' counsel unless there was a pleural registry in place where that counsel practiced.[18] Testimony of Lawrence Fitzpatrick, February 23, 1994 at 191-92, JA 667. But when CCR sat down with class counsel to negotiate the futures class settlement, it made known that it would be willing to negotiate inventory settlements with plaintiffs' attorneys if and when CCR became "reasonably confident" that there would be a class settlement establishing a minimal level of medical criteria for a compensable claim. Testimony of Lawrence Fitzpatrick, February 23, 1994 at 192-93, JA 667. In May or June of 1992, CCR reached that level of confidence that the class negotiations would succeed, and it fulfilled its promise to begin negotiating inventory settlements. Testimony of Michael Rooney, February 28, 1994 at 202-03, JA 761-62. Unfortunately for the members of the class, they were not among the many people who benefitted from CCR's change in policy.

However one labels the behavior of class counsel, they failed to fulfill their duties of adequate representation by effectively bargaining away the rights of class members in exchange for benefits that went to other clients, to themselves, and to third parties. As Professor John Coffee testified, class counsel's existing clients reaped greater than market value in settling their claims as part of inventory settlements conducted by class counsel with the CCR. March 29, 1994 Tr. at 54. Conversely, class members received less value for their claims in the settlement than they would have in the tort system. *See supra*, Part I; Testimony of John Coffee, March 29, 1994 at 116. In light of the Settling

[18] A "pleural registry" is an order by a court requiring that asbestos defendants waive the statute of limitations against claimants who do not meet an objectively measurable level of functional impairment from asbestos exposure, and that such claimants will not have the right to seek compensation until they are able to demonstrate the requisite level of impairment. *See* Testimony of Lawrence Fitzpatrick, February 22, 1994 at 123.

Parties' acknowledgement that these inventory settlements would not have occurred but for CCR's belief that the class settlement would be reached, *See, e.g.*, February 23, 1994 Tr. at 193-94, the only fair inference is that class members traded value in return for which CCR paid present inventory claimants.

1. Class counsel's inventory claims received substantially greater compensation than they would have received under the *Georgine* settlement.

A comparison of the values received by class counsel's inventory clients with the negotiated average value ranges under the class settlement shows that class members gave up rights in return for benefits that went to the inventory clients of class counsel. That class members who are situated similarly to the inventory clients will receive less value for their claims raises the unavoidable inference that class counsel traded away the rights of class members for the benefit of their present clients and themselves. Data supplied by the Settling Parties reveals that inventory clients fared much better than they would have under class deal. Settling Parties' Exhibit 302 reveals the total amount of settlements for Ness, Motley clients, the total amount for Greitzer & Locks clients, and the number of claimants in each disease category. Using this data from SP 302 and the negotiated average value ranges for each disease category found in the Compensation Schedule to the *Georgine* SOS, Objectors' Exhibit 170 (a copy of which is attached to this brief) reveals that both Ness, Motley and Greitzer & Locks

received substantial premiums for their inventory settlements as compared with the *Georgine* values.[19]

Using two extremely generous assumptions, Objectors' Exhibit 170 shows that Ness, Motley's present clients received 54 percent more[20] and Greitzer & Locks clients received 72 percent more[21] in the inventory settlements than those same claimants would have received under the class deal. The first assumption benefitting the Settling Parties is that the claimants would have received the high end of the maximum negotiated average value under the class settlement. Actually, it is far more fair to assume that CCR will pay on average only its minimum legal obligation under the agreement, which is the *low end* of the negotiated average value ranges, as is discussed in detail in Part I(A)(1) of this brief. The second assumption that tilts this comparison sharply in favor of the Settling Parties is that all of class counsel's present inventory clients would have qualified for cash compensation under the class settlement at all. The evidence suggests that in reality 45 to 50 percent of lung cancer and other cancer claimants who file claims

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[19] Exhibit O-170 was offered by Professor John Coffee as part of his expert testimony that class counsel collusively negotiated the class settlement. Professor Coffee accepted no money from objectors for his time in the case, *see* March 29, 1994 Tr. at 21, nor was he paid by objectors or others for his article discussing this case (among others). *See* John C. Coffee, Jr., *Class Wars: the Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1343 n.* (1995). This fact stands in contrast to an article relied upon by Petitioners, the writing of which they funded. Edley & Weiler, *Asbestos: A Billion-Dollar Crisis*, 30 Harv. J. Legis. 383, 383 n.aa1 (1993).

[20] This percentage was calculated by dividing the difference between what was actually paid Ness, Motley's inventory clients and the estimated recovery for those same clients under *Georgine* ($138,077,100 - $89,660,000 = $48,417,100), by the estimated *Georgine* recovery ($89,660,000).

[21] This percentage was calculated by dividing the difference between what was actually paid Greitzer & Locks's inventory clients and the estimated recovery for those same clients under *Georgine* ($77,417,000 - $44,907,500 = $32,509,500), by the estimated *Georgine* recovery ($44,907,500).

and receive money in the tort system will not qualify under *Georgine*,and a majority of non-malignant claimants will also not qualify. *See supra* at Part I(A). There is nothing in the record to suggest that the inventory claims were any different from the average group of claims filed in the tort system. *See* JA 770-71.[22]

2. Other evidence demonstrates that class counsel traded away the rights of class members to benefit other interests.

In addition to the comparison of relative value discussed above, the record reveals many other indicators that class counsel collusively negotiated this settlement. The first and most important is class counsel's behavior revealing that they believed their present clients were receiving a better deal than class members. Mark Iola, a plaintiffs' attorney who is affiliated with Ness, Motley in some cases,[23] testified that class counsel Joe Rice advised a group of Ness, Motley co-counsel during a Miami meeting in November, 1992 that "the terms as to certain nonmalignant people in the futures deal, are going to be worse than the terms for those people in the present system and . . . people [should] get their cases on file." Testimony of Mark Iola, March 30, 1994 at 68.

Iola's testimony is corroborated by Objectors' Exhibit 16 (a copy of which is attached to this brief), an August 21, 1992 memorandum from Motley to all Ness, Motley affiliated counsel, which explicitly warns against the possibility of upcoming agreements that would harm the interests of future claimants. The memo states:

[22]For a detailed critique of the district court's failure to credit Exh. O-170, *see* Susan Koniak, *Feasting While the Widow Weeps*: Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1066-78 (1995).

[23] Testimony of Mark Iola, March 30, 1994 at 26-27.

> Judge Weiner is pressing extremely hard for a settlement of all asbestos personal injury cases pending in New England. If this settlement agreement is signed, the judge may use it as a blueprint for future settlement negotiations. Please be advised that the New England Agreement includes a so-called "futures agreement" that would establish minimum medical criteria for payment of future claims. Present claims would not be burdened with such criteria.
>
> **Therefore, in order to have your cases considered "present claims" we are advising you to serve and file as many of your unfiled cases as soon as possible.**

Exh. O-16 at 2 (emphasis in original). This document speaks for itself – Motley advised all of his affiliated counsel to file claims as soon as possible so as to avoid the risk that those claims would be "burdened" with the necessity of meeting minimum medical criteria in order to be paid. One month later, Motley and Rice reentered the negotiations, which imposed just such criteria on class members.

Of course, the best evidence of class counsel's professional judgment regarding the relative merits of the class and inventory settlements are found in the terms of the deals themselves. *None of the more than thirteen thousand of class counsel's inventory clients suffering from non-malignant disease sought a waiver of the statute of limitations from CCR rather than cash.*[24] The district court's attempts to justify this disparate treatment of similarly situated claimants are spurious. Cert. App. 188a ("finding" that future claimants may legitimately be treated differently than present

[24]Professor John Freeman, who was the ethics expert consulted by Ness, Motley during the course of the class negotiations, testified that it was his understanding at the time that all of the present unimpaired clients of Ness, Motley settled for cash in the inventory deals. March 11, 1994 Tr. at 16.

claimants because they had "different expectations" from present claimants).[25]

Class counsel's sell-out of the futures class for the benefit of present claimants is not made acceptable by the fact that CCR settled inventories with law firms other than class counsel after becoming confident that the class agreement would be reached. Those agreements are consistent both with CCR's short-term goal of having the class action approved and its long-term goal of resolving all of its pending and future asbestos liabilities. As Professor Coffee testified, it would not have been realistic for CCR to assume that the class action could be approved if the entire plaintiffs' bar, other than class counsel, formed a united phalanx to oppose it. Thus, by settling the inventories of other plaintiffs' firms, CCR assured that there would be some support for the class action from other attorneys. *See* Testimony of John Coffee, March 29, 1994 at 61-62.[26]

B. Class Counsel Negotiated the Settlement While Laboring Under Disqualifying Conflicts Of Interest

[25] Indeed, Professor Hazard, who unlike Freeman had not been informed that none of the inventory claimants received waivers of the statute of limitations in lieu of cash, testified that he had assumed that a significant number of the inventory claimants had accepted Green Cards because it was the best "professional judgment" of their counsel to do so. February 25, 1994 Tr. at 140. In fact, when asked to assume the contrary, Hazard acknowledged that such a fact could be an indicator of collusion. *Id.* at 146.

[26] In addition to giving up class leverage for the benefit of the inventory settlements, class counsel negotiated at least one provision into the class settlement that will benefit themselves at the expense of most of the class. By CCR's admission, the settlement requires that otherwise identically situated claimants will be treated differently based solely upon the historical track record of their attorneys. *See* SOS(VIII)(B)(2), JA 80; Testimony of Lawrence Fitzpatrick, February 24, 1994 Tr. at 88-89. The natural result of this reality created by the settlement will be to drive claimants to historically successful lawyers, such as class counsel, *see* Ex. SP 502, CCR Doc. No. 2000263, and thereby to allow those lawyers to corner the market.

Class counsel's collusive negotiation of the *Georgine* settlement constituted a realization of exactly the dangers the Model Rules of Professional Conduct are designed to prevent. Although the actual harm from class counsel's concurrent representation of class members and present clients did not result until the deals for both sets of clients were struck, under Model Rule 1.7(b) class counsel should have been disqualified from representing the class from the moment they understood CCR's negotiating posture, which raised an unmistakable spectre of conflicting interests.

Model Rule of Professional Conduct 1.7(b) (1983) provides:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The comment to the rule goes on to state: "[a]n impermissible conflict may exist by reason of . . . the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. (1983).

In this case, class counsel should never have represented the futures class because they knew that, in light of CCR's settlement posture, such representation would almost certainly be materially limited by responsibilities owed to their present clients. There was little question in late 1991 that inventory settlements would be in the best interests of both class counsel and their present clients, and once the class negotiations began, class counsel knew that in order

for CCR to be willing to enter into inventory settlements for the benefit of their present clients, they would have to agree that future claimants must meet some level of objective medical criteria that demonstrated pulmonary function impairment as a result of asbestos exposure. Because there was at least a substantial possibility that such an agreement imposing medical criteria would "materially limit" their representation of the futures class, and because there was no reasonable method of obtaining the consent of the class to the dual representation, Motley, Rice, and Locks should have declined to negotiate the *Georgine* settlement.[27]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Maynard Ungerman
Ungerman & Iola
P.O. Box 701917
Tulsa, Oklahoma 74170-1917
(918) 495-0550

Counsel of Record for Asbestos Victims of America
January 15, 1997

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[27]For a more thorough discussion of the ethical conflicts and other adequacy problems plaguing class counsel, *see generally* Susan Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, 80 CORNELL L. REV. 1045 (1995).

APPENDIX

O-16

NESS, MOTLEY,
LOADHOLT, RICHARDSON & POOLE

MEMORANDUM

TO: All Asbestos Personal Injury Co-counsel

FROM: Ronald L. Motley, Esquire and Charles W. Patrick, Jr., Esquire

RE: Recent Developments in Asbestos Litigation/Ness, Motley Personal Injury Co-counsel Meeting

DATE: August 21, 1992

The Asbestos Litigation Group is having an educational seminar in Miami, Florida on Friday, November 6 through Sunday, November 8, 1992. A tentative agenda for this meeting is enclosed.

In conjunction with the ALG Seminar, we will have a Ness, Motley Co-counsel Meeting on Thursday, November 8, 1992 in Miami. Both the Co-counsel Meeting and the ALG Seminar will be held at the Grand Bay Hotel in Coconut Grove, Florida. We are negotiating special room rates with the hotel, and you can obtain a reservation by calling the Grand Bay Hotel at (305) 558-2600. Indicate to them that you are reserving a room for the ALG/Ness, Motley Co-counsel Meeting.

We have enclosed a tentative Co-counsel agenda as well.

As you know, we are extremely disappointed with Judge Weiner's handling of the MDL. Ness, Motley, along with several other members of the Plaintiffs' Steering Committee, has moved before the MDL Panel for remand of all cases to their home jurisdictions. A hearing before the MDL Panel has been

Deposition Exhibit
F-2-9

scheduled on September 25, 1992 in Colorado Springs, Colorado. The MDL Panel will probably have issued a ruling on our Motion for Remand by November 5, and you can be updated on the MDL at this time.

In the meantime, Judge Weiner is pressing extremely hard for a settlement of all asbestos personal injury cases pending in New England. If this settlement agreement is signed, the judge may use it as a blueprint for future settlement negotiations. Please be advised that the New England Agreement includes a so-called "futures agreement" that would establish minimum medical criteria for payment of future claims. Present claims would not be burdened with such criteria.

Therefore, in order to have your cases considered "present claims" we are advising you to serve and file as many of your unfiled cases as soon as possible.

Additionally, you received a FAX from Susan Nial indicating that the Celotex Bankruptcy counsel was taking the position that we had to file Proof of Claim forms for cases that had been settled with Celotex, but had not been paid by Celotex. On August 11, 1992, Judge Baynes ruled that "no asbestos related claims, including claims based on settlements, were subject to the Bar Order." Attached is a letter from Sheldon Toll, our bankruptcy counsel, reporting on the Judge's decision.

Finally, even though we have moved for a remand of all asbestos claims in the MDL, you should still aggressively move for remand of individual cases. Judge Weiner has been reluctant to remand any cases other than malignancy claims. We urge you to move for remand of all of your mesothelioma and lung cancer cases. If you file a Motion for Remand, the Judge's clerk will most likely set a settlement conference on the case, and, although it may take several telephone conference calls, you will either receive offers for settlement or the case will be remanded. You should be aware that Judge Weiner

has a policy of remanding cases without remanding the punitive damage claim.

Our tentative arrangement with the Grand Bay Hotel in Coconut Grove is that a block of rooms will be held until October 5, 1992. After October 5, the rooms will be released to the general public. You need to make reservations as soon as possible. We look forward to seeing you all there.

Copy of Exhibit O-170

COMPARISON OF NESS, MOTLEY INVENTORY SETTLEMENTS WITH *GEORGINE* NEGOTIATED AVERAGE VALUE RANGE

Disease Category	[A] Number of Inv. Cases	[B] *Georgine* Neg. Avg. Value Range	[A x B]
Mesothelioma	97	$60,000	$ 5,820,000
Lung Cancer	315	$30,000	$ 9,450,000
Other Cancer	85	$12,500	$ 1,062,500
Non-Malignant	9,777	$ 7,500	$73,327,500
		Total [C]:	$89,660,000
Total Actually Paid Ness, Motley Inventory Claimants per SP303 [D]:			$138,077,100
		Difference [D - C]:	$48,417,100

COMPARISON OF GREITZER & LOCKS INVENTORY SETTLEMENTS WITH *GEORGINE* NEGOTIATED AVERAGE VALUE RANGE

Disease Category	[A] Number of Inv. Cases	[B] *Georgine* Neg. Avg. Value Range	[A x B]
Mesothelioma	174	$60,000	$10,440,000
Lung Cancer	271	$30,000	$ 8,130,000
Other Cancer	52	$12,500	$ 650,000
Non-Malignant	3,425	$ 7,500	$25,687,500
		Total [C]:	$44,907,500
Total Actually Paid Greitzer & Locks Inventory Claimants per SP303 [D]:			$77,417,000
		Difference [D - C]:	$32,509,500